

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 93
5581589

BETWEEN	FIRST UNION INCORPORATED Applicant
AND	ALLEN HENRY and OTHERS listed in SCHEDULE 'A'. Second Applicants
AND	SMITH & DAVIES LIMITED Respondent

Member of Authority: Andrew Dallas

Representatives: Stephen Parry, Counsel for Applicant
Erin Davies and Harriet Dymond-Cate, Counsel for
Respondent

Investigation Meeting: On the papers

Determination: 23 March 2016

DETERMINATION OF THE AUTHORITY

- A. The correct interpretation of cl 17 of the Smith & Davies Limited and First Union (Inc.) (Transport and Logistics Sector) Collective Agreement, 1 August 2014 – 31 July 2015 is that two weeks notice of termination is required under cl 17.1 except in the circumstances contained in cl 17.2.**
- B. Within 14 days of the date of this determination, Smith & Davies must pay the amounts calculated as two weeks wages set out in Schedule 'B' to the Agreed Statement of Facts dated 12 February 2016 to Allen Henry and the Others listed in Schedule "A" to this Determination.**

C. By agreement between the parties, there was no order for costs.

Employment relationship problem

[1] This matter first came before the Authority as a significant employment relationship problem between the parties about unpaid entitlements, redundancy compensation and notice.

[2] During a case management conference convened with the parties on 18 November 2015, a number of directions were made including a direction to attend mediation.

[3] The parties resolved all but one issue in mediation and a determination was jointly sought to resolve this issue, which is identified in paragraph [5] below.

[4] I determined the matter, at the request of the parties, on the papers under s 174D of the Employment Relations Act 2000 (the Act).

Issue

[5] The issue for determination was: what is the correct interpretation of cl 17 of the Smith & Davies Limited and First Union (Inc.) (Transport and Logistics Sector) Collective Agreement, 1 August 2014 – 31 July 2015?

Agreed Facts

[6] The parties agreed on the following facts:¹

- (i) Smith & Davies Limited (Smith & Davies) is a duly incorporated company formerly operating as a trucking business.
- (ii) First Union is a registered union under the Act.
- (iii) First Union and Smith & Davies are parties to the Smith & Davies Limited and First Union (Inc.) (Transport and Logistics Sector) Collective Agreement, 1 August 2014 – 31 July 2015 (collective agreement) dated 4 September 2014.

¹The agreed facts have been adjusted for style and tense.

- (iv) The term of the collective agreement was 1 August 2014 to 31 July 2015.
- (v) The second applicants were employees of Smith & Davies and, at all relevant times, were members of First Union and fell within the coverage clause of the collective agreement.
- (vi) On 5 May 2015, the employees were advised that Smith & Davies had ceased trading and that their employment was terminated effective immediately.
- (vii) On or around 12 May 2015, Smith & Davies paid the employees for all work performed up to and including 5 May 2015.
- (viii) On or around 28 May 2015, Smith & Davies paid all accrued and outstanding holiday pay to the employees.
- (ix) On 2 December 2015, the parties entered into a settlement in respect of the employees' claim for redundancy compensation under the collective agreement.
- (x) The sole outstanding issue between the parties is whether or not Smith & Davies is required to pay wages in lieu of notice to the employees (and, if so, the quantum thereof). The relevant clause of the collective agreement states:
 - (xi) 17. Notice of termination
 - 17.1 Notice of termination of employment (whether by dismissal or resignation) will *normally* be 2 weeks.) [Emphasis added]
 - 17.2 In the case of abandonment of employment or serious misconduct, the employer may dismiss with a lesser period of notice or without notice.
- (xii) For the purposes of assessing the quantum of any payment in lieu of notice, the parties agreed the employees' weekly wages were to be assessed as the total pay received by them in the three months prior to their redundancy, divided by the number of weeks worked during that period as set out in Schedule 'B' to the Agreed Statement of Facts.

[7] In addition, Smith & Davies stated the following in respect of the events which occurred on 5 May 2015, being the day the employees were dismissed:

- a) Without its prior knowledge, the vehicles used by the employees listed in Schedule 'A' were uplifted by its lenders.

- b) With no vehicles, these employees could not perform their duties.
- c) Two former directors of the company who were on its site (but who had resigned as directors in March 2015) without the Smith & Davies' authority verbally advised the employees that:
 - (i) Termination of their employment was effective immediately; and
 - (ii) Smith & Davies would cease trading immediately;
 - (iii) As a result, Smith & Davies had no opportunity to redeploy some and/or all of the employees.

[8] Neither First Union nor the employees sought to make comment or cross-examine witnesses about these contentions.

Principles for interpreting collective agreements

[9] The principles of contractual interpretation are well established. The leading decision is that of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.² These principles also apply in the employment jurisdiction to the interpretation of collective agreements.³

[10] The Court in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*⁴ has given useful guidance about how these principles apply to collective agreements:

[17] ... it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, never the less, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what

² [2010] 2 NZLR 444 (SC).

³ [2010] ERNZ 317 (CA).

⁴ [2011] NZEmpC 149.

individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[11] It is important to recognise that a collective agreement is the result of collective bargaining. Collective bargaining is far from an exact process and is undertaken, for the most part, by a lay committee comprising representatives of employers and unions. Bargaining sometimes takes place over long periods and within difficult industrial contexts. The collective agreement that emerges is often the result of pragmatic rather than precise drafting.⁵ It is not uncommon, therefore, for collective agreements to contain anomalies, inconsistencies or, even, novel forms of drafting arising out of concession and compromise by the parties. Construing a collective agreement in such circumstances must be an exercise in arriving at the most logical and sensible outcome within the parameters of the principles of interpretation outlined above.

Submissions of the parties

First Union

[12] First Union contended that cl 17.1 read in conjunction with cl 17.2 meant that employees covered by the collective agreement would “normally” receive two weeks’ notice upon termination of employment under cl 17.1 except in circumstances of abandonment of employment or dismissal for serious misconduct as set out in cl 17.2. First Union submitted these exceptions were contained in an exhaustive (or closed) list.

[13] It submitted that if redundancy, as contended by Smith & Davies, was also an exception to the payment of notice this would be inconsistent with both the plain wording and structure of cl 17 and the common law position that reasonable notice of redundancy would be implied into the agreement.⁶

[14] It also submitted that cl 18 of the collective agreement was a separate and distinct clause dealing with redundancy compensation. It said this clause contained neither an exception to the notice payable under cl 17.1 nor otherwise overrode it.

⁵For a similar observation by the Court, see: *Association of Staff in Tertiary Education v Webster* [2006] ERNZ 37 at [56]

⁶*Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641 (CA).

[15] It further submitted the employees were entitled to rely on the notice provisions of cl 17.1, meaning they would have the opportunity to either work out their notice or be paid out their notice.⁷ However, neither of these alternatives was offered to the affected employees.

Smith & Davies

[16] Smith & Davies contended the starting point was the natural and ordinary meaning of the words contained in cl 17.1 of the collective agreement.

[17] It submitted that the use of the word “normally” in cl 17.1 anticipated circumstances in which reduced or no notice could be given and this included, what it described as, the “abnormal” circumstances set in paragraph [7] above.

[18] It gave the definition of “normal” from the Shorter Oxford Dictionary, which was “regular, usual, typical; ordinary, conventional”, and said the circumstances of the employees’ dismissals did not meet this definition.

[19] It took issue with the submission of the First Union that the employees should have been able to work out their notice because, unlike the administrative employees who were able to do so, the primary tools of the trade for these employees, their trucks, were no longer available to Smith & Davies.

[20] It submitted that as cl 18 was silent on the issue of notice of termination, it was necessary to go to cl 17.1. It further submitted that as cl 17.1 did not reference cl 17.2, the latter clause merely provided two examples of situations where no or reduced notice could be given. It said the use of the word “normally” in cl 17.1 and the lack of a reference to cl 17.2 created a “degree of flexibility”, subject to the general operation of the law, for both Smith & Davies and the employees.

[21] It then referred to the Latin canon of interpretation “expressio unius est exclusio alterius” - which means in English, and indeed, plain English, the mention of one thing excludes all other things - suggesting a non-exhaustive (or open) list in cl 17.2 would be prefaced by “including”, “for example” or “including, but not limited to”.

⁷*Eagle v Flight Centre (NZ) Ltd* ERA Auckland AA123/10, 16 March 2010 at [43].

[22] It accepted that cls 17.1 and 18 needed to be read together but said as cl 18 was silent on notice and cl 17.1 only dealt with “normal” circumstances - the particular circumstances being “abnormal” - the issue of notice must be determined by what was “fair and reasonable”.

[23] Smith & Davies in reply to First Union’s submission that reasonable notice would be implied at common law into the agreement cited the Court of Appeal decisions in *Aoraki Corporation Ltd v McGavin*⁸ and *Charta Packaging Ltd v Howard*.⁹ These later decisions of the Court of Appeal did not appear to sit entirely comfortably with the more expansive approach taken in *Ogilvy & Mather*.

First Union in reply

[24] First Union submitted that it was immaterial whether Smith & Davies complied with its notice obligations to other employees suggesting that the basis of their submission was that it believed it only had to pay notice when it was convenient for it to do so. First Union said acceptance of the proposition that business needs emerging after the settlement of a collective agreement could nullify its effect would undermine the integrity and utility of collective agreements.

[25] It said cl 17.2 “exhaustively populates” the exceptions to notice under cl 17.1. First Union also said that while cl 17.1 did not directly refer to cl 17.2, it was clear that they formed part of the same overall clause and were intended to be read together.

[26] Lastly, First Union observed that Smith & Davies’ submission about “expressio unius est exclusio alterius” supported its own argument.

Correct interpretation

[27] In reaching a conclusion about the correct interpretation of cl 17, I first carefully considered the submissions of the parties, examined the relevant provisions of the collective agreement and adopted the principles of interpretation outlined above.

[28] While the use of the word ‘normally’ in cl 17.1 is slightly unusual, cl 17 when read as a whole does give a sensible and logical result.

⁸[1998] 1 ERNZ 601 (CA)

⁹[2002] 1 ERNZ 10 (CA)

[29] Clause 17.1 read in conjunction with cl 17.2 means employees would “normally” receive two weeks’ notice under cl 17.1 upon termination of employment except in circumstances of abandonment of employment or dismissal for serious misconduct as set out in cl 17.2. The two exceptions contained in cl 17.2 provided the only exceptions to the requirements of cl 17.1 and were in that sense exhaustive. While cl 17.1 did not directly refer to cl 17.2 it was clear from the plain words and overall structure that they were subparts of cl 17 and were intended to be read, and so it follows, operate, together.

[30] Smith & Davies use of the interpretive tool “*expressio unius est exclusio alterius*” was slightly surprising given its contention that cl 17.2 only provided two examples of circumstances in which no or reduced notice could be given to employees. It was not entirely clear how this assisted its position. Indeed, if anything, it tended to support that of First Union.

[31] In any event, cl 17.2 had no work to do in the present matter as the employees were neither dismissed for abandonment of employment or serious misconduct. If, conversely, cl 17.2 was applicable there were three possible outcomes for the employees: (a) 2 weeks’ notice was given (b) less than two weeks’ notice was given or (c) no notice was given. Consequently, even if cl 17.2 contained only examples of circumstances where no or reduced notice could be given as suggested by Smith & Davies, it was still open to it to pay two weeks’ notice to the employees or properly exercise the discretion afforded to it by the clause to pay no or reduced notice.

[32] I accept the submission of First Union that cl 18 of the collective agreement was a separate and distinct clause dealing with redundancy compensation and contained neither an exception to the notice payable under cl 17.1 nor otherwise overrode it. Clauses 17.1 and 18 when read together gave a logical and sensible outcome – that is, in circumstances of redundancy an employee was entitled to two weeks’ notice under cl 17.1 and to the redundancy compensation under cl 18. To begin a process of classifying circumstances surrounding termination of employment as “normal” and “abnormal” as Smith & Davies effectively suggests is contrary to this logical and sensible outcome and invites controversy and uncertainty.

[33] It was slightly troubling that while Smith & Davies submitted that in “abnormal” circumstances notice must be determined by what was “fair and reasonable”, it then went on to argue, in effect, no notice should be paid to the employees. Even if the circumstances described by Smith & Davies were “abnormal”, it was open to its current directors to make good on the failure to pay notice under the collective agreement at any point after they became aware of the events of 5 May 2015 and prior to the issuing of this determination and they should have done so.

[34] It would be contrary to cl 17, and also inequitable, to disentitle the employees of their notice of termination as consequence of what was, in effect, a falling out between current and former directions of Smith & Davies.

Implied reasonable notice?

[35] Having regard to the submissions of the parties about the common law position of implied reasonable notice, in light of the enactment of s 103A of the Act and the Court of Appeal’s decision in *Grace Team Accounting v Brake*¹⁰, it is not clear to what extent, if at all, *Ogilvy & Mather*, *Aoraki* and *Charta Packaging* have relevance beyond being reflective of the historical development of the law. In any event, it was not necessary to imply reasonable notice into the collective agreement as it was provided for in cl 17.1.

Result

[36] The correct interpretation of clause 17.1 of the Smith & Davies Limited and First Union (Inc.) (Transport and Logistics Sector) Collective Agreement, 1 August 2014 – 31 July 2015 is that two weeks’ notice of termination is required except in the circumstances contained in clause 17.2. The circumstances in cl 17.2 do not apply in this case.

[37] Within 14 days of the date of this determination Smith & Davies, must pay the amounts calculated as two weeks wages set out in Schedule ‘B’ to the Agreed Statement of Facts dated 12 February 2016 to Allen Henry and the Others listed in Schedule “A” to this Determination.

¹⁰[2014] ERNZ 129 (CA).

Costs

[38] The parties agreed there would be no order for costs.

Andrew Dallas
Member of the Employment Relations Authority

Schedule 'A'

	First Name	Surname
1.	Quinton	Arendse
2.	Theo	Bunyan
3.	Richard	Galloway
4.	Rocky	Hill
5.	Jim	Huinga
6.	Bruce	Krammer
7.	Sean	Mason
8.	Kerry	Nahu
9.	Ian	Nelson
10.	Shaun	Rapata
11.	John	Robinson
12.	Mark	Robinson
13.	Kevin	Scott
14.	Ian	Strom
15.	Ivan	Taukolo
16.	Gerry	Versteeg
17.	Tony	Wilkie